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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 598.

HARRY F. MORSE, *Appellant*,

vs.

THE UNITED STATES OF AMERICA.

Appeal by Harry F. Morse from Judgment of the District Court of the United States for the Southern District of New York, Entered June 20, 1924, Dismissing His Application for Release by Habeas Corpus and Remanding Him to the Custody of the Marshal of the Southern District of New York.

BRIEF FOR APPELLANT.

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Of Counsel.

December 1, 1924.

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INDEX.

CASES CITED.

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Appeal by Harry F. Morse from Judgment of the District Court of the United States for the Southern District of New York, Entered June 26, 1924, Dismissing His Application for Release by Habeas Corpus and Remanding Him to the Custody of the Marshal of the Southern District of New York.

BRIEF FOR APPELLANT.

Statement of Procedure.

On February 6, 1923, while *en route* through New York from his residence in Connecticut to attend his trial upon criminal charges pending against him in the Supreme Court of the District of Columbia, the appellant was forcibly re-

moved from the train at New York City by the marshal of the Southern District of New York, acting under authority of a bench warrant issued upon an indictment found in said District charging the appellant with the crime of conspiracy.

Appellant, contending that his arrest was illegal, applied for and procured a writ of *habeas corpus* and demanded immediate discharge from custody.

The marshal of the Southern District of New York filed a return to the writ, averring, in substance, that the arrest was made by virtue of a bench warrant issued upon an indictment filed in the Court on April 27, 1922 (fols. 4-6).

With the permission of the Court, the appellant filed an additional affidavit in support of his application for discharge and as a traverse and reply to the return of the marshal, verified February 23, 1923 (fols. 6-32), the appellant was produced before Hon. Francis A. Winslow, United States District Judge for the Southern District of New York, and admitted to bail pending the determination of his application by *habeas corpus,* in the sum of fifteen thousand dollars ($15,000), which was furnished. Judge Winslow subsequently, on July 19, 1924, dismissed the writ of *habeas corpus* (fols. 53-54) and filed an opinion (fols. 49-53). The appellant filed five assignments of error, averring that his arrest and detention was in violation of his rights under the Constitution of the United States and the due process clause of the Constitution (fols. 54-56), and presented his petition for appeal to the Supreme Court of the United States (fols. 56-57), which was allowed (fols. 57-61), citation served, appeal to this Court duly perfected, and bail fixed upon appeal in the sum of five thousand dollars ($5,000), the appeal to operate as a supersedeas until the further order of the District Court.

Statement of Facts.

The facts are undisputed and are substantially as follows:

In January, 1922, the appellant was indicted by two separate indictments in the Supreme Court of the District of Columbia charged with having conspired to defraud the United States and to commit offenses against the United States in the matter of the alleged cheating and defrauding of the Fleet Corporation. The defendant was arraigned in the District of Columbia, pleaded not guilty, and, after the disposition of preliminary motions, admitted to bail and the trial of the indictments upon the merits was *peremptorily* set by Hon. Wendell P. Stafford, Justice of the Supreme Court of the District of Columbia, for trial in the said Supreme Court at 10 o'clock a. m. on February 6, 1923.

In April, 1922, the defendant was also indicted by a Federal grand jury in the Southern District of New York charged with having conspired to violate the provisions of Section 37 and Section 215 of the Federal Penal Code in the alleged fraudulent use of the United States mails. At the time of the indictment in New York a codefendant, Benjamin W. Morse (also appellant here in case No. 597), was in Boston, Massachusetts, where he resided, and the appellant Harry F. Morse was in the State of Connecticut, where he resided. The Government instituted removal proceedings under Section 1014 of the Revised Statutes in both the Massachusetts and Connecticut jurisdictions to remove the said respective defendants to New York for trial.

In Connecticut, removal proceedings for the removal to New York of Harry F. Morse were instituted before a United States Commissioner, who, after hearing oral testimony

comprising several hundred typewritten pages of testimony and much documentary evidence, decided in favor of the Government and ordered the appellant Harry F. Morse committed to the custody of the marshal for removal. Upon this hearing the Government introduced evidence and cross-examined witnesses. The said Harry F. Morse thereupon applied for a writ of *habeas corpus* to Hon. Edwin S. Thomas, United States Judge in the District of Connecticut, and the United States applied for a warrant of removal. By agreement of counsel, both proceedings in Connecticut—that is, the removal proceedings and the *habeas corpus* proceedings—were consolidated and heard together, and Judge Thomas, after a full hearing and examination of the evidence taken before the United States Commissioner, in an opinion which is attached to the petition for writ of *habeas corpus* herein (fols. 33-49), held that the New York indictment did not charge the defendant Harry F. Morse (appellant here) with the commission of a criminal offense under the United States laws; that there was no probable cause to believe the said defendant, Harry F. Morse, guilty of the commission of a crime; that the Commissioner had not followed the Connecticut practice in the hearing which was had before him, and that upon the entire record the petitioner, Harry F. Morse, was entitled to be discharged and to go without day. Judge Thomas also denied the application of the Government to remove said Harry F. Morse to the Southern District of New York, so that the proceedings in Connecticut had fully terminated prior to the second arrest in New York, both by the denial of the Government's application to remove the defendant to New York and by the decision in favor of the said defendant upon the writ of *habeas corpus*.

The Government's removal proceeding in Connecticut was based in part upon a bench warrant issued upon the New York indictment, which was the same bench warrant upon which the appellant was subsequently arrested in New York on the fifth day of February, 1923 (fols. 10-11).

The Massachusetts proceeding for the removal of the defendant Benjamin W. Morse was initiated before a United States Commissioner and, evidene having been taken at length, was pending before him undetermined on the fifth day of February, 1923, the defendant Benjamin W. Morse being there admitted to bail. On February 8, 1923, the Boston Commissioner handed down his decision finding that there was no probable cause and discharging the defendant Benjamin W. Morse from custody.

From the foregoing, the Court will note, as the first important and established questions of fact, that at the time of the second arrest of the appellant in New York, on the sixth day of February, 1923—

1. The petitioner, Harry F. Morse, had been fully discharged in Connecticut and was under bail and in the custody of his bondsman on the bond given in the Washington jurisdiction.

2. That the defendant, Benjamin W. Morse, was under bail in Massachusetts in the proceedings pending before the Commissioner which were then undetermined, and was also under bail and in the custody of his bondsman on the bond given in the Washington jurisdiction.

With the Washington case definitely and peremptorily set for trial on the morning of February 6, 1923, the defendants, Harry F. Morse and Benjamin W. Morse, boarded the Federal Express of the New York, New Haven & Hart-

ford Railroad at their respective places of residence (Benjamin W. Morse at Boston, Mass., and Harry F. Morse at New London, Conn.), and proceeded by this, "the usual, shortest and most direct route" to Washington. While they were asleep in their berths, at midnight, and as the train was *en route* to Washington, passing through New York City, they were summarily and forcibly taken from their Pullman berths on the train by the United States marshal and his assistants in the Southern District of New York and arrested upon the bench warrants which had been previously issued on the New York indictment, and upon which bench warrants had been used in connection with the previous arrest of both of the defendants in the removal proceedings, as aforesaid. The petitioner Harry F. Morse immediately sued out a writ of *habeas corpus* and subsequently enlarged the averments of his petition, as allowed by statute, and, with the permission of the Court, by an additional affidavit, so that the entire matter was brought before the District Court upon the petition for *habeas corpus,* the return of the marshal, and the traverse or additional affidavits filed by the petitioner. Hon. Francis A. Winslow, United States Judge, Southern District of New York, after a hearing, as aforesaid, dismissed the petition, remanded the petitioner, and allowed an appeal to this Court.

Law Points.

1.

THE ARREST OF THE DEFENDANT IN NEW YORK CITY WHILE PASSING THROUGH NEW YORK EN ROUTE TO TRIAL IN WASHINGTON WAS ARBITRARY, UNAUTHORIZED, ILLEGAL, AND CONSTITUTED A VIOLATION OF THE CONSTITUTIONAL SAFEGUARD OF "DUE PROCESS OF LAW."

The Fifth Amendment to the Constitution provides:

> "Nor (shall any person) be deprived of life, liberty or property without due process of law."

The process which is meant in this clause of the Constitution is Federal Process.

In re Mahon, 34 Fed. Rep. 530.

The law applies to the District of Columbia and proceedings therein or related thereto.

Lappin vs. District of Columbia, 22 App. Cas. (D. C.) 76.

Wilson vs. McDonald, 265 Fed. Rep. 432.

Groot vs. Reilly, 266 Fed. Rep. 1008.

"Due process of law" in each particular case means such exercise of the powers of Government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of case to which the one in question belongs.

Cooley on Constitutional Limitations, page 434 (6th Edition, 1890).

U. S. vs. Yount, 267 Fed. Rep. 861.

In the Yount case, *supra*, it is held that:

> "'Due process of law' within constitutional Amendments Five and Fourteen is equivalent to 'the law of the land' *and is intended to protect the citizens against arbitrary action* and to secure to all persons equal and impartial justice."
> *Davidson vs. New Orleans*, 96 U. S. 97.
> *Missouri Pacific Railway vs. Humes*, 115 U. S. 512.

In the much-quoted case of *Columbia Bank vs. Oakley* (1819), 4 Wheat. 244; 4 U. S. (L. Ed.) 559, it is held:

> "The words 'due process of law' were intended to secure the individual *from the arbitrary exercise of the powers of government*, unrestrained by the established principles of private rights and distributive justice."

In judicial proceedings "due process of law" must be a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law.

Burton vs. Plater, 1893, 53 Fed. 904.
Exparte McClusky, 40 Fed. 74.
Exparte Harlan, 180 Fed. 119.

It is established by the foregoing that the sovereign cannot arbitrarily exercise summary power in total disregard of the rights of the individual and without consideration of the rights or parties to be affected. Due process of law and a consideration of existing rights is particularly needed in judicial proceedings, and the sovereign cannot arbitrarily

destroy those rights by mere summary action. In the case at bar the defendant had been absolutely and peremptorily ordered and *required* by the Court to be present before Judge Stafford and a jury in Washington for trial on the morning of February 6, 1923, under indictments there found by the sovereign. The case in Washington could not have proceeded to trial without the defendant; the charge was a felony, and his personal presence before the Court and jury had been definitely ordered and was required by law.

Lewis vs. U. S., 148 U. S. 372.
Hopt vs. Utah, 110 U. S. 579.
Diaz vs. U. S., 223 U. S. 442.

The action of the Government in arresting the defendant as he was passing through New York, and thereby preventing him from being present at his trial in Washington on February 6, 1923, could not under any consideration be held to have been—

> "according to those rules and forms which have been established for the protection of rights,"

referred to in the foregoing cases, but was, on the contrary, an absolute denial of the private rights of the individual to be present at the time that his case was to be called for trial in Washington. The petitioner was not a passenger upon an intrastate train; he had not voluntarily come into the jurisdiction of New York; he had previously resisted removal proceedings to the Southern District of New York and his resistance to the removal proceedings had been successful and had resulted in his discharge in Connecticut and the exoneration of his bail. In Massachusetts the removal proceedings were still pending and were being stoutly

resisted by the defendant Benjamin W. Morse. The defendand, therefore, did not voluntarily come into the State of New York, but was merely *passing through New York en route* to Washington, pursuant to the order of Justice Stafford, by "the usual, most direct, and shortest route" thereto. He was a passenger on an interstate car and train—the Federal Express. He did not leave the train when it arrived in New York, but was asleep in his berth when arrested. The appellant, having been peremptorily ordered to appear in Washington for trial, was not voluntarily within the State of New York, but he was obliged to pass through New York in order to reach Washington, unless he had traveled by water or by an unnecessarily circuitous route. He came from his place of residence and passed through New York for the sole purpose of reaching Washington, as directed by the Court. This was necessarily "a compulsory passing through New York" and has been so held in a somewhat similar case.

U. S. vs. Bridgeman, 248 Fed. Cas. 14645, 9 Biss. 221-223, 9 Rep. 74.

This is the law of New York also.

Sander vs. Harris, 14 N. Y. Suppl. 37.
Day vs. Harris, 14 N. Y. Suppl. 73.
Murphy vs. Sweezy, 2 N. Y. Suppl. 41.

There is no parallel in the suggestion made by counsel for the Government at the argument before Judge Winslow to the effect that if a defendant passing through Ney York stepped from the train and committed a crime at the station he could be arrested in New York. Nothing of that kind occurred or is involved in any way in this case.

Not only did the Government violate the constitutional rights of the defendants to "due process of law," but the "usual mode of process" was violated.

"Usual mode of process" applies to the procedure by which the offender may be arrested and imprisoned or bailed.

U. S. vs. Powloski, 270 Fed. Rep. 285.

In *U. S. vs. Baird,* 85 Fed. Rep. 633, a witness came into the State of New Jersey in response to a subpœna from a Federal Court. While in New Jersey he was arrested on State criminal process and was immediately released by the Court upon *habeas corpus* and the arrest vacated. Judge Kirkpatrick held:

> "It is further ordered that the said John J. Boyle be safely conducted back to the City of Philadelphia in the Eastern District of Pennsylvania from whence he came; and that the marshal of the United States for the District of New Jersey attend so that he shall have safe passage to the place from whence he came."

It was further held that Boyle, having been subpœnaed by the United States to attend in New Jersey as a witness and having left Pennsylvania for that purpose, was entitled to protection from arrest by the State authorities of New Jersey for any alleged offense before then charged to have been committed by him.

How much more definite should the protection be when both proceedings are conducted by the same sovereign, as in the case at bar, where we have the sovereign in one jurisdiction directing the defendant to appear and using the summary and arbitrary power of the Government in another

jurisdiction to prevent him from appearing. It was known to the Government authorities in the Southern District of Ney York that the case of the appellant Harry F. Morse in Washington had been peremptorily set for trial for February 6, 1923, and it was known that he was *en route* to his trial. The sovereign, therefore, with full knowledge of the situation, detained and restrained the defendant in another jurisdiction, and thereby prevented his trial from proceeding and risked the forfeiture of his bail in Washington. Was this "due process of law" or was it a mere arbitrary exercise of the power of arrest without any consideration whatever for the rights of the defendant? Can this Court say that the arrest of the defendant was "orderly procedure," and that it was " in the ordinary manner prescribed by the law" and "according to those rules and forms which have been established for the protection of private rights"?

In *Chandler vs. Sherman*, 162 Fed. Rep., at page 19, it is held that—

> "A Federal Court has power to protect a litigant therein from seizure of his person by the authority of a State while in attendance upon the trial of his case."

If the power of the Federal Court could be used to protect a litigant from interference in a State Court, how much more should it be exercised in favor of a litigant in its own courts who is unfortunate enough to have proceedings brought against him by the sovereign in two jurisdictions.

Unreasonable and arbitrary exercises of power are illegal, violating the guarantee of due process of law, and persons deprived of liberty under such acts are entitled to be re-

leased by writ of *habeas corpus* issued from the proper courts of the United States.

8 *Cyc.* 1088.

In re Ash Joy, 29 Fed. Rep. 181.

In re Lee Tong, 18 Fed Rep. 253.

Again, "due process of law" is defined as—

> "Law in the regular course of administration through courts of justice."
>
> 8 *Cyc.* 1081.
>
> 2 *Kent's Commentaries* 10.

Can it be solemnly argued that the arrest of these defendants in New York in a manner which operated to prevent their attendance at the trial in Washington was "in the regular course of administration through courts of justice?" If courts of justice were to be administered in this manner throughout the United States the conditions which would ensue are so apparent as to condemn the practice without argument. Citizens accused of crime would be of all men most miserable.

The effect of the arrest in New York was to prevent the trial in the Supreme Court of the District of Columbia from proceeding at the time fixed. The regular course of administration through courts of justice required due consideration for the rights of the defendants in whichever jurisdiction the trial was appointed to be held.

Again, we have "due process of law" defined as—

> "The application of law as it exists in the fair and regular course of administrative procedure."
>
> 8 *Cyc.* 1081.
>
> 2 *Kent's Commentaries* 10.

And this was the law of Blackstone, where it is held:

> "Jurors, suitors and witnesses in attendance in a court of record are privileged from arrest."
> 3 *Blackstone's Commentaries* 289.
> 3 *Cyc.* 274.

In a South Carolina case, *Sadler vs. Bay,* 5 Rich., S. C., 523, the defendant was arrested and summoned to appear at Chester; while on his way there he was arrested on the same cause of action and summoned to appear at York, the first suit having been discontinued without his knowledge. It was held that he was privileged from arrest. (See also a Michigan case.)

Baldwin vs. Branch, 48 Mich. 525, 12 N. W. 686, where it was held that where appearance bail has been accepted from one arrested on a criminal warrant issued by a justice he cannot, pending his release on bail, be arrested in a civil *capias* upon the same matter at the suit of the same complainant. In the case at bar the sovereign is the complainant in both jurisdictions.

In *Ponzi vs. Fessenden,* 258 U. S. 260 (opinion by Chief Justice Taft), this Court had occasion to comment upon the fact that a defendant accused of crime by the sovereign cannot be in two places at the same time and inferentially condemned the Government's practice in the case at bar.

The Court held:

> "One accused of crime has a right to a full and fair trial according to the law of the Government whose sovereignty he is alleged to have offended. * * * (he) "cannot be in two places at the same time. He is entitled to be present at every stage of

the trial of himself in each jurisdiction with full opportunity for defense."

Frank vs. Mangum, 237 U. S. 309-341
Lewis vs. U. S., 146 U. S. 370.

"If that is accorded him, he cannot complain."

Harry F. Morse was, therefore, entitled to be present in Washington on the morning of the 6th day of February, 1923, when his case had been set for trial, and the action of the sovereign in subjecting him to a second arrest in New York constituted, not only a violation of his constitutional rights, but a clear interference with the proper functioning of the Washington Court.

In *King vs. Orr,* 5 U. C. Q. B. O. S. 724, it is held:

> "When a justice takes bail for an appearance at a fixed time, a second arrest by complainant for the same charge before the time appointed is illegal."

The rule in civil cases has always been:

> "Parties to civil actions while in actual attendance upon the courts, and while going to and returning from the courts, are exempt from arrest under civil process."

2.

THE SECOND ARREST OF APPELLANT UPON THE SAME BENCH WARRANT WHICH HAD BEEN USED AS THE BASIS OF THE REMOVAL PROCEEDING IN CONNECTICUT WAS ILLEGAL, AS THE BENCH WARRANT HAD SPENT ITS FORCE; WAS *functus officio,* AND THE DISCHARGE IN CONNECTICUT OPERATED LEGALLY TO DISCHARGE THE APPELLANT FROM ANY FURTHER CONFINEMENT UNDER THAT PARTICULAR PROCESS.

The bench warrant was originally issued by the District Court in New York on July 19, 1922 (fols. 49-50). It was

sent to the United States Attorney in Connecticut and made the basis of removal proceedings in that State (fols. 10-11).

On January 25, 1923, the appellant was finally and fully discharged by Judge Thomas in Connecticut and removal to New York denied. (Fols. 11-12.)

On February 5, 1923, appellant was subjected, while passing through New York, to a second arrest upon *the same bench warrant which had been previously used in Connecticut* (fols. 10-11).

This was an improper and oppressive use of the Court's process.

In *Ex parte George Milburn*, 34 U. S. (9 Peters) 704, Judge Story wrote:

> "A discharge of a party under a writ of *habeas corpus* from the process under which he is imprisoned discharges him from any further confinement under the proceeding; but not under any other process which may be issued against him under the same indictment."

A different question might be presented if a new bench warrant had been issued by the District Court in New York with knowledge of the discharge in Connecticut upon application duly made by the United States Attorney. But here we have the same process functioning in two jurisdictions and the appellant subjected to a second confinement after the first confinement had been judicially set aside.

A rearrest without any warrant or process is entirely unwarranted. If such a proceeding were tolerated, the writ of *habeas corpus* would be of no avail.

Matter of Titton, 76 Howard Prac. (N. Y.) 303.

An order of discharge other than for technical or cureable defects terminates the pending proceeding so that the person discharged cannot be further restrained thereunder or again arrested or held in custody unless a new prosecution is instituted.

In re Crandall, 59 Kansas 671.

State vs. Holm, 37 Minn. 405.

After a person has been admitted to bail, an officer has no right to rearrest him under the same process.

5 *Corpus Juris,* 437.

To authorize a rearrest, a new warrant should be issued.

Sherman vs. State, 2 Ga. A. 686, 58 S. E. 1122.

"When a party was in attendance before the district court of a county in which the crime charged was alleged to have been committed, in compliance with prior regular proceedings by which he was held by a committing magistrate to await the action of the grand jury, and before the grand jury had acted on his case or been discharged, he was again arrested on a charge of the commission of the same offense, the Court held the second arrest to be illegal."

State vs. Rilly, 109 Minn. 437, 124 N. W. 13.

"When a justice takes bail for appearance at a fixed time, a second arrest by the same complainant, for the same charge, before the time appointed is illegal."

King vs. Orr, 5 U. C. Q. B. O. S. 724.

In those cases where a second arrest has been tolerated, there has uniformly been a "new proceeding" with "new process" after discharge on the first proceeding.

In re White, 45 Fed. R. 237.

In re Collins vs. Loisel, 262 U. S. 430, there was a "new proceeding" with new affidavits after a previous discharge.

See also *Sutton vs. Butler,* 74 Misc. 251.

Hinds vs. Parker, 11 App. Div. 327.

3.

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA HAD EXCLUSIVE JURISDICTION OF THE PERSON OF THE DEFENDANT BECAUSE:

1. IT HAD FIRST ACQUIRED JURISDICTION AND ADMITTED THE APPELLANT TO BAIL.

2. IT HAD NOT GIVEN CONSENT TO AN ARREST IN NEW YORK OR TO AN INTERFERENCE WITH ITS DATE FIXED FOR TRIAL.

3. THE WASHINGTON JURISDICTION HAD NOT BEEN EXHAUSTED.

The defendant having been first arrested in the District of Columbia and there admitted to bail, was legally under the exclusive control and jurisdiction of that Court, and of his bondsman.

In Exparte Johnson, 167 U. S. 120, this rule is well laid down and fully discussed. The opinion is by Justice Brown who held that if the United States Court for the Eastern District of Texas:

> "Had acquired jurisdiction it was entitled to try the defendant,"

and

> "In this connection jurisdiction of the 'case' that is the crime, is indistinguishable from jurisdiction of

the person who is charged with the crime. We know of no reason why the rule so frequently applied in cases of conflicting jurisdiction between Federal and State Courts should not determine this question. Ever since the case of Ableman vs. Booth, 21 How. 506, it has been the settled doctrine of this Court that a Court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted and that no other Court has the right to acquire such custody or possession."

15 *Corpus Juris,* 1166;
Chandler vs. Sherman, 162 Fed. 19;
Daret vs. Duncan, 4 Fed. Cases No. 581;
Sadlier vs. Fallen, 21 Fed. Cases No. 12209;
Peo. vs. Sage, 11 A. D. 4.

In *U. S. vs. Marrin,* 227 Fed. Rep., 314, 318, the Court said:

"If a person be answerable to two different jurisdictions for offenses against the laws of each it is a physical fact that he cannot be at the same time in the control of each. It is, therefore, necessary that one give way to the other for the time being. It is convenient and desirable that there be a rule by which it can be determined which authority shall make way for the other. This rule is that known as the rule of comity. It answers with Courts and cabinets, in law and in diplomacy substantially the same purpose which personal courtesies serve in the social relations of life. *One of the principles is that the court which first asserted jurisdiction may continue its assertion without interference from the other.*"

The Washington Court having been the Court in which the defendant was first indicted and in which he was first

admitted to bail, had exclusive jurisdiction at the time of the second illegal arrest in New York to proceed to trial on February 6, 1923, the time appointed, without interference from the representative of the sovereign in New York—the United States Attorney for the Southern District of New York.

> "The tribunal which first gets jurisdiction holds it to the exclusion of the others until its duty is fully performed and the jurisdiction invoked is exhausted; and the same rule applies alike in both civil and criminal causes. The removal of a person by a court of competent jurisdiction beyond the control of his bondsmen, thus rendering them unable to produce the person at the time and place set for trial as undertaken by the condition of his bond, is in the language of the authorities 'an act of law' and can be set up in defense to a suit on the bond."
>
> *In re James*, 18 Fed Rep. 583.

> "A court which has in its custody a person charged with a crime has exclusive custody and jurisdiction until the question of his guilt or innocence is determined; and a person arrested on a Commissioner's warrant and either in custody, or held to bail pending his examination for removal to another district in answer to a criminal charge *is not subject to a second arrest* for removal to a different district until the first proceeding has been terminated."
>
> *In re Beavers*, 125 Fed. Rep. 988.

See, also,

Ponzi vs. Fessenden, 258 U. S. at p. 260.
Covell vs. Heyman, 111 U. S. 176.
McCauley vs. McCauley, 202 Fed. R. 280-284.
State vs. Chimault, 55 Kans. 326.
Ex parte Earley, 3 Ohio Dec. 105.

Commonwealth vs. Fuller, 8 Minn. 318.
Hill Mnfg. Co. vs. Providence & N. Y. S. S. Co., 113 Mass. 495.
Ayers vs. Farrell, 196 Mass. 350.
Wayman vs. Southard, 10 Wheat. 1.
Taylor vs. Taintor, 16 Wall. 366.
Felts vs. Murphy, 201 U. S. 123.
Harkvader vs. Wadley, 172 U. S. 163.
In re Johnson, 167 U. S. 120.
Opinion of the Justices, 201 Mass. 607.

In the case at bar the United States is "the common sovereign" and also "the common accuser." The Washington Court which first acquired jurisdiction had never given consent to arrest in the Southern District of New York; nor is any consent shown in the moving papers so that the arrest in the Southern District of New York created a condition which necessarily conflicted with and disturbed the due administration of justice in the Washington Courts. This was referred to by Judge Brandeis in Stallings *vs.* Splain, 253 U. S. 342, where he says:

> "The question would merely have been whether a second arrest properly could be made when it conflicted with the first."

By the arrest in New York the defendant was deprived of his Constitutional rights to a speedy trial in the District of Columbia, and by the same sovereign.

Beavers vs. Haubert, 198 U. S. 85.

The sovereignty of the United States had first attached its jurisdiction in Washington and had not been asked to yield it.

In *Peckham vs. Henkel,* 216 U. S. 482, it is held:

> "The present case differs upon this point from that of Beavers *vs.* Haubert, in that *the consent of the court of prior jurisdiction* was not obtained as in that. In that case the court reversed the question as to 'whether the Government had the right of election *without such consent*' to proceed in either of two districts in which indictments were pending."

In extradition cases there is immunity from a second arrest.

In re Baruch, 41 Fed. Rep. 472.

4.

THE DEFENDANT HAVING BEEN ADMITTED TO BAIL IN WASHINGTON WAS ALSO LEGALLY IN THE CUSTODY OF HIS BONDSMAN AS HE PASSED THROUGH NEW YORK ON THE SLEEPING CAR AND WAS IN A LEGAL SENSE AS MUCH UNDER ARREST AS IF ACTUALLY CONFINED.

The general rule is as stated by Mr. Justice Wayne in *Taylor vs. Taintor,* 16 Wall. 371—a leading case.

> "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of his original imprisonment."

See also, *In re Beavers,* 125 Fed. 988, affirmed 194 U. S. 73.

A person while held to bail in one court is not subject to arrest under an indictment in another court, particularly without the consent of the first Court.

(Same cases as last above cited) and also:

Hernandez vs. Camobell, 11 N. Y. Superior Court, 642.

10 *Howard's Practice,* 433.

5.

THE ARREST IN NEW YORK CONFLICTED WITH THE WASHINGTON JURISDICTION AND VIOLATED THE PRINCIPLE OF JUDICIAL COMITY.

The case in Washington before Mr. Justice Stafford could not proceed unless the defendant was personally present; and he could not be present because on the very midnight before his trial he was arrested and detained by the United States, the common accuser, in the Southern District of New York. This was wholly subversive of the principle of judicial comity, which is defined as:

> "The principle in accordance with which the course of one State or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect."
>
> *Mast vs. Stover Mnfg. Co.*, 177 U. S. 485.

Had the Supreme Court in the District of Columbia been requested to consent to the arrest in New York a different state of facts would be here presented.

250 U. S. 283:

> "Comity * * * is not a rule of law but a rule of practice, convenience, and expediency."
>
> *Watts vs. Unione Austriaca di Navigaziona*, 224 Fed. Rep. 188-192.

In the *Marrin case*, 227 Fed. Rep. at page 317, it is held:

> "It is too clear for necessity of citing supporting authorities that any court has the power to assert its jurisdiction and in the legal sense preserve its dignity

by preventing the interference of any other authority with the work which that court had in hand to do."

"*In the enforcement of this principle courts will relieve from arrest and even* from the service of civil process on witnesses who are in attendance upon the business of the court. In recognition of the same principle no court will direct the services of its process upon persons who are thus in attendance upon another court."

This Court will observe the application of the facts of the case at bar as applied to the rule of law above laid down. The defendant being actually in the custody of his bondsman in the Washington jurisdiction was actually in that jurisdiction, in the legal sense, and being *en route* to his trial was not subject to a second arrest in the Southern District of New York, particularly upon a bench warrant upon which removal to New York had been denied. In recognition and enforcement of the great principle of judicial comity, and in order to preserve the due and orderly administration of justice and the application of the Constitutional right of due process of law, the District Court should have relieved from the wholly arbitrary and illegal second arrest by vacating the same upon the appellant's application by *habeas corpus*.

This is not a case where a defendant was unlawfully abducted or kidnapped, from one State, or one jurisdiction, to another, or where he is fraudulently brought into the jurisdiction, or where he has voluntarily come into the jurisdiction; it is a case of a defendant duly admitted to bail in another jurisdiction and *en route* to his trial, being arrested upon an old bench warrant which had wholly spent its force and from the effect of which he had been previously discharged in the State of Connecticut by a Federal Judge.

It is submitted that the facts of this case are wholly different from any case recorded in the books. There is no precedent anywhere which would authorize or justify the second arrest which the Federal authorities perpetrated in the Southern District of New York upon this petitioner in the arbitrary, high-handed and wholly illegal manner disclosed by this record.

This case stands wholly by itself as a concrete example of the oppressive tactics of certain Government officials and the arbitrary exercise of the great power of the United States contrary to the due process clause of the Constitution and to all of the great legal principles sanctioned by the Courts for the protection of the citizen and the orderly and dignified administration of justice. It was an entire disregard of the decision of Judge Thomas and of the order of Judge Stafford that the trial in his Court should proceed on the day fixed by him, and of all of the principles of due process of law and judicial comity.

6.

THE DECISION OF UNITED STATES JUDGE THOMAS IN CONNECTICUT DISCHARGING THE APPELLANT IN HABEAS CORPUS PROCEEDINGS AND DENYING THE GOVERNMENT'S APPLICATION FOR HIS REMOVAL WAS CONCLUSIVE IN APPELLANT'S FAVOR AS ESTABLISHING THAT HE WAS ILLEGALLY HELD IN CUSTODY AND WAS RES JUDICATA OF ALL ISSUES OF LAW AND FACT NECESSARILY INVOLVED IN THAT RESULT. SUCH DECISION COULD NOT BE ARBITRARILY DISREGARDED BY THE UNITED STATES, NO APPEAL HAVING BEEN TAKEN THEREFROM.

One of the questions "necessarily involved" in Judge Thomas' decision was that the bench warrant issued in New

York for appellant's arrest was illegally issued. This holding the Government officials set at naught and wholly defied by using the same bench warrant for a second arrest and subjecting appellant to a "second confinement" thereunder.

The Government had instituted removal proceedings in Connecticut against appellant Harry F. Morse, and such proceedings were had in that jurisdiction that Judge Thomas held that the indictment in the Southern District of New York upon which the arrest was made did not charge the defendants with the commission of a Federal offense. The opinion of Judge Thomas is printed in the record (Fols. 33-49) herein and is referred to for the full detail of the conclusions there reached.

It is submitted that the question of whether the indictment charged an offense under Federal laws was *a question of substantive law,* and where a matter is decided as one of substantive law it is conclusive upon the Government until reversed upon appeal. There was no technicality involved in the decision of Judge Thomas. It was a broad holding that the New York indictment charged no offense whatsoever.

It must be admitted that the legal sufficiency of the indictment raised a question of substantive law, and this question was submitted to Judge Thomas both by the defendant and by the Government, argued at length, and briefs submitted. Judge Thomas held that the indictment was bad, that it did not charge the commission of a Federal offense, and discharged the defendant. This then became the *law of the case* until reversed on appeal. It could not be arbitrarily disregarded by the Government, as it was in the instant case by a second arrest in New York.

The arrest in New York not only violated the principle of judicial comity, as related to the Washington jurisdiction, but also wholly violated, disregarded and set for naught the decision of Judge Thomas in the Connecticut jurisdiction.

Is it possible that the Government can submit its rights in removal proceedings to a Federal Judge in Connecticut and then when the question is decided against it wholly disregard the decision, and without an appeal arrest the defendant upon the original bench warrant when he is merely passing through the jurisdiction of New York en route to his trial in the District of Columbia?

Every principle of judicial comity—due process of law—regard for the proper forms of orderly procedure, requires that the decision of Judge Thomas should stand as the controlling law of the case until reversed. The decision of a Federal judge having jurisdiction of the subject-matter and the person of a defendant, that the indictment did not charge an offense under Federal laws is, we submit, just as much a decision upon the merits of that phase of the controversy as in the *Oppenheimer case,* 242 U. S. 85, wherein Judge Holmes wrote:

> "Of course the quashing of a bad indictment is no bar to a prosecution upon a good one; but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another."

Even the decision of a United States Commissioner, while not given the dignity of res-judicata has been held to be conclusive. It is held in

U. S. vs. Hoa, 167 Fed. Rep. 211

that:

> "The decision of the United States Commissioner refusing to commit a prisoner for removal to another Federal district for trial of a criminal charge does not render the question of the right to such removal *res judicata*, but ordinarily in the absence of special circumstances *it should be held conclusive on the same facts.*"

See also:

Palmer vs. Thompson, 20 App. D. C. 273.
29 *Corpus Juris* 178.
Palmer vs. Colladay, 18 App. D. C. 426.
Targun vs. Bean, 109 Me. 189.
McConologues Case, 107 Mass. 154.
Exparte Hamilton, 65 Miss. 98.
Exparte Jilz, 64 Mo. 205.
Yates vs. People, 6 Johns 337.
In re Crow, 60 Wis. 349.

In *Horn vs. Mitchell*, 223 Fed. Rep., 550, it is held that:

> "When an order is made by a judicial officer of one Federal district having authority to act for the removal of a person arrested in that district to another where he is charged with crime, and the order is regular on its face and was based on proceedings of which the Court had jurisdiction it may not be reviewed by the Court in the latter district in *habeas corpus* proceedings."

An order of judgment discharging a person in *habeas corpus* proceedings is conclusive in his favor that he is illegally held in custody and is *res judicata* of all issues of law and fact necessarily involved in that result.

Judge Thomas concededly had jurisdiction of the person of the defendant Harry F. Morse; he had jurisdiction of the case; and the Government submitted its rights when it asked Judge Thomas to issue a warrant of removal to the Southern District of New York.

In the *habeas corpus* proceeding before Judge Winslow based upon the second arrest, Judge Winslow was in effect asked by the Government to review, or sit in appeal upon, the decision of Judge Thomas, and not to give it any effect whatsoever. If Judge Thomas was right and the indictment here does not charge an offense, then the defendant ought not to have been held in any event. Could Judge Winslow say upon the argument before him that the decision of Judge Thomas was wrong; or should the decision upon that matter in the orderly course of judicial procedure have been left to the Circuit Court of Appeals upon appeal by the Government?

Was Judge Winslow authorized to wholly disregard the decision of a District Judge of concurrent authority and jurisdiction upon a question of law and arbitrarily set it aside, or should it have been held that due process of law required the Government to appeal from the decision of Judge Thomas and that until reversed upon appeal such decision was the law of this case?

> "When an order is made in one federal district, by a judicial officer having authority to act, for the removal of a person arrested in that district to another when he is charged with crime, such order, if regular on its face, and based on proceedings of

which the Court has jurisdiction, will not be reviewed on *habeas corpus* in the second district."

Horn vs. Mitchell, 223 Fed. R. 549; aff. 232 Fed. R. 879.

U. S. vs. Robinson, 126 Fed. R. 1016.

Every principle of judicial comity and due process of law required that this second arrest should have been vacated and the Government remitted to its right to appeal from the decision of Judge Thomas in the Connecticut District.

See also:

Williams vs. State, 83 S. K. 790; 169 Ind. 384;

U. S. vs. Chungshee, 71 Fed. Rep. 279.

Freeman on Judgments, Section 324, sustains this view in the following language:

> "If, on the other hand, the prisoner is discharged from custody this is an adjudication that at that time he was entitled to his liberty and is conclusive in his favor should he be again arrested unless some authority can be shown for holding him which did not exist at the time of his discharge."

And in *Church on Habeas Corpus,* Section 386, I find:

> "Again it has been held that in proceedings upon *habeas corpus* the determination of the Court upon the facts has the effect of a verdict of a jury."
>
> *Bonnett vs. Bonnett,* 61 Iowa 199; 16 N. W. 91.

Indeed, the authorities, without exception, seem to hold that when a person has been discharged upon *habeas corpus*

all issues of law and fact necessarily involved are *res judicata* and the person so discharged cannot for the same cause be "lawfully rearrested" upon the same process. Such in effect was the ruling of this Court in *Collins vs. Loisel,* 262 U. S. 430.

In the Connecticut proceeding all of the facts before the Commissioner, together with the indictment, were before Judge Thomas upon the question of probable cause and the decision of Judge Thomas found that upon these facts the allegations of the indictment could not be sustained; and that the indictment is defective as matter of law.

We submit that this decision should have a conclusive effect until reversed. See also:

Sutton vs. Butler, 74 Misc. 251; 76 Fed. Rep. 951; 133 N. Y. Supp. 936; 66 A. D. 327; 42 N. Y. Supp. 955.

Hinds vs. Parker, 11 A. D. 327.

These cases last cited hold in substance that:

> "A person discharged from custody on *habeas corpus* may not lawfully be arrested again for the same cause."
>
> "An order discharging a person in *habeas corpus* proceedings made by a court possessing jurisdiction has a binding force and effect upon all parties concerned."

7.

THE WRIT OF HABEAS CORPUS SHOULD HAVE BEEN SUSTAINED, THE ARREST OF THE DEFENDANT VACATED, AND THE DEFENDANT DISCHARGED.

A summary of the facts and law of this case will disclose the very unusual situation presented to the Court for decision. If the position of the Government is sustained this Court is also asked to set at naught the decision of Judge Thomas and to hold that defendants in a criminal suit discharged in one jurisdiction by a Federal Judge after a full consolidated hearing upon *habeas corpus* and removal proceedings and in the custody of their bondsmen for appearance in another Federal jurisdiction and actually necessarily en route to that jurisdiction for trial may be summarily detained in the jurisdiction to which the Government's right of removal had been denied, and upon an indictment which had been held not to charge a criminal offense, all in violation of every principle of judicial comity, in violation of the right of the Washington bondsman to produce the appellant before the Court for trial, and in violation of the orderly and due processes of the law, and of every principle of fairness in the administration of justice. This Court is dealing with the actions of the representatives of the Federal Government, which Government in the instant case is both sovereign and accuser, with one hand pulling the defendant into court for trial and with the other hand forcibly holding him so that he could not appear. An anomalous and wholly unusual situation is here created which it is not believed that this Court will sanction. The decision of Judge

Thomas should have been held conclusive upon the same process until reviewed and reversed upon appeal and the Court of Judge Stafford in the District of Columbia should have been accorded full respect by the representatives of the Government.

The facts set out in the petition and supplementary affidavits of the appellant were not denied, and it is respectfully submitted that the writ of *habeas corpus* should have been sustained and the defendant discharged from custody.

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DECEMBER 1, 1924.